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IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

DARRYL KEITH BURNETT,
Defendant-Appellant

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

At the Suppression Hearing, does the Government carry its burden when it fails to show the arresting officer possessed a reasonable suspicion of criminal activity to expand a traffic stop?

At a Suppression Hearing, can hearsay testimony substitute for the arresting officer's testimony about his "reasonable suspicion" justifying his expansion of a traffic stop?

LIST OF RELEVANT PARTIES

Darryl Burnett	*Defendant*
Malcolm R. Newman, Esq.	*Defense Attorney*
Unites States of America	*Complainant*
Redding Pitt, Esq. of Alabama	*U.S. Attorney, Middle District*
Louis Franklin, Esq.	*Assistant U.S. Attorney, Middle District of Alabama*

CORPORATE DISCLOSURE STATEMENT

No entity involved herein is a Corporation other than Malcolm R. Newman, Attorney, P.C.

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TABLE OF CITED AUTHORITIES

1. *U.S. v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989)

2. *U.S. v. Pruitt*, 174 F.3d. 1215 (11th Cir. 1999)

3. *U.S. v. Smith*, 201 F.3d 1317 (11th Cir. 2000)

4. *United States v. Tapia*, 912 F.2d, 136

5. *United States v. Williams*, 876 F.2d 1521 (11th Cir. 1989)

OFFICIAL CITATION

There are no official or unofficial Citations.

STATEMENT OF JURISDICTION

The judgment involved was entered May 23, 2000. This Court entertains jurisdiction pursuant to 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

The U.S. Court of Appeals for the Eleventh Circuit exercise jurisdiction of this matter pursuant to 28 U.S.C. Section 1291.

On February 10, 1999, the Defendant Darryl Burnett was a passenger in a car stopped by an Alabama State Trooper because the car did not properly display the license plate. After initial questioning of the driver, the officer instructed the driver to come and sit in the patrol car. While collecting the routing information to issue a citation, the officer allegedly told the driver that he smelled "like a blunt" (slang for marijuana) and told the driver to stay put while he searched the car.

The officer then proceeded to question the Defendant and another passenger about marijuana and told them he was calling for the dog (narcotics team K-9). Saying he was hot, Burnett asked if he could wait outside and was allowed to exit the car. After a short time Burnett attempted to discard a small plastic bag but was seen by the officer. Burnett retrieved the bag and as the officer approached him, ran towards a wooded area. He was caught by the trooper and the bag again retrieved.

Once searched, a small amount of marijuana was on his person as well as rock cocaine in the bag.

At the Pre-Trial Suppression Hearing, the arresting officer did not testify. The Government elicited the "facts" from another officer who was not present at the scene, but who had read the report of the arresting officer. No other officer present at any hearing or trail testified that the driver or Burnett smelled of marijuana upon being interrogated on the afternoon of the stop and arrest.

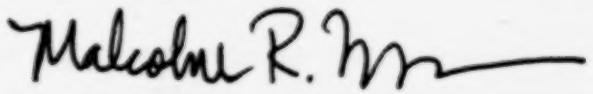
ARGUMENT

The Eleventh Circuit ignores its own precedent on the question of reasonable suspicion as well as that of this Court. Starting with its holding in *United States v. Tapia*, 912 F.2d 136 (11th Cir. 1990) and repeatedly over the following decade, the Eleventh Circuit established that "reasonable suspicion" by a police officer to justify a search and seizure, was more than a "hunch". *See, U.S. v. Pruitt*, 174 F3d. 1215 (11th Cir. 1999); and that it is determined from the totality of the Circumstances (citing *U.S. v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed. 2d 1 [1989]), and from the collective knowledge of the officers involved in the stop (citing *United States v. Williams*, 876 F.2d 1521 [11th Cir. 1989]).

As recently as March 2000 the Court continues to base its rulings on this issue squarely on the *Tapia* bedrock and its progeny. *U.S. v. Smith*, 201 F.3d 1317 (11th Cir. 2000). Here again, the Court relied on the arresting officer's training and experience to supply part of the equation for determining when reasonable suspicion exists.

There was no testimony or evidence on this aspect in the Suppression hearing below. There was nothing about the Alabama officer's assessment of Circumstances that warranted further intrusion other than the hearsay testimony by fellow officer that the arresting officer smelled marijuana. In the absence of these key elements of the formula, the Appeals Court should have reversed and rendered for the Defendant.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon:

Solicitor General of
The United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

by placing a copy of the same in the United States mail, postage prepaid, on this 18th day of August, 2000.

Malcolm R. Newman

Malcolm R. Newman, Esq.

APPENDIX

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13305

D.C. Docket No. 99-00047-CR-N

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DARRYL KEITH BURNETT,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Alabama

(May 23, 2000)

Before ANDERSON, Chief Judge, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

Defendant-Appellant Darryl Keith Burnett challenges his conviction for possession with intent to distribute cocaine base and possession of marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 844, on the ground that the district court erred in denying Burnett's motion to suppress. We AFFIRM.

I. Factual Background

On February 10, 1999, State Trooper Will Keenan ("Keenan") stopped a car in which Burnett was a passenger. Keenan legally stopped the car because it had no license tag. Because the car's driver had no license, Keenan asked him to exit the car and come with Keenan to the police vehicle. Keenan alleged in his police report that he smelled the odor of marijuana in the police vehicle and, accordingly, left the driver in the police vehicle and then asked the passengers if they had marijuana. The passengers denied having drugs, and Burnett asked if he could leave the car because he was hot. Keenan permitted Burnett to leave the car, at which point (according to Keenan), Burnett removed an item from his pocket and threw the item. Keenan alleged that he approached Burnett, who grabbed the item and tried to run away; before Keenan caught him, Burnett again threw the item. Keenan retrieved the item, which was a bag containing approximately 22 grams of cocaine base. Burnett was arrested at the scene and read his *Miranda* rights. The police then searched the car and found marijuana. Burnett was transported to a drug task force office, where he was interrogated by federal agent Les Moore ("Moore"). During the course of that interrogation, Burnett made incriminating statements admitting that the cocaine was

his. Burnett was indicted for possession with intent to distribute 22 grams of cocaine base and for possession of marijuana.

Burnett filed a motion to suppress. The magistrate judge held a suppression hearing, with Moore and another federal agent testifying for the Government and Burnett testifying for the defense. Moore related the substance of Keenan's police report, including Keenan's claim that he had smelled marijuana before he questioned Burnett about drugs. During the suppression hearing, Burnett's counsel clarified his motion to indicate that he was seeking suppression on the grounds that Keenan did not have the reasonable suspicion to justify expanding the traffic stop to a drug investigation. The magistrate judge recommended that the district court deny the motion to suppress. After Burnett objected, the district court adopted the magistrate judge's recommendation but stated that "the issue may be revisited at trial after all witnesses have testified on the suppression issue." R1-26-1. At trial, Keenan was one of the four witnesses offered by the Government. *See* R1-26-4. The jury convicted Burnett on both counts. After sentencing, Burnett timely appealed the denial of his motion to suppress.

II. Discussion

A district court's denial of a motion to suppress presents a mixed question of law and fact. *See United States v. Gil*, 204 F.3d 1347, 1350 (11th Cir. 2000). We review for clear error the district court's factual findings and review *de novo* its application of law to the facts. *See id.*

Burnett does not dispute that the initial traffic stop was reasonable but argues that Keenan lacked the reasonable suspicion necessary to expand that stop into a drug investigation. "In evaluating the reasonableness of an investigatory stop0, we must examine whether the stop 'was reasonably related in scope to the circumstances which justified the interference in the first place'" *Id.* at 1351 (quoting *United States v. Sharpe*, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed. 2d 605 [1985]). As we noted in *United States v. Pruitt*:

> once an officer has briefly stopped a motor vehicle operator for the purpose of issuing a traffic violation..., the officer's continuing detention of the vehicle's occupants is authorized under the Fourth Amendment only if the officer can point to "specific and articulable facts which, taken together with rational interferences from those facts, reasonably warrant the intrusion."

174 F.3d 1215, 1219 (11th Cir. 1999) (quoting *United States v. Griffin*, 109 F.3d 706, 708 [11th Cir. 1997]). Thus, we look to whether Keenan had a "reasonable articulable suspicion," such that "the totality of the circumstances create, at least, some minimal level of objective justification for the belief that the person engaged in unlawful conduct." *United States v. Blackman*, 66 F.3d 1572, 1576 (11th Cir. 1995); *see also United States v. Tapia*, 912 F.2d 1367, 1370 (11th Cir. 1990) (discussing reasonable suspicion in the context of traffic stops).

Here, Keenan allegedly smelled marijuana on the driver of the car. The Supreme Court has noted that reasonable suspicion for a seizure exists where an officer sees and recognizes drugs. *See California v. Hodari D.*, 499 U.S. 621, 624, 111 S.Ct. 1547, 1549, 113 L.Ed. 2d 690 (1991). We see no difference between that situation and one where the officer smells and recognizes drugs. Burnett does not appear to challenge this proposition, but instead argues that (1) there has been no showing that Keenan was qualified under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993) to testify that the substance that he smelled was marijuana and (2) that the magistrate judge erred in relying on hearsay testimony about Keenan smelling the marijuana. We reject the first proposition. Regardless of whether Burnett is correct in his claim that Daubert applies to testimony about the smell of marijuana,[1] this case involves the question of whether Keenan had a *reasonable* suspicion that unlawful behavior was afoot — not whether he had the substance that he allegedly smelled was, to a scientific certainty, marijuana. Burnett's second argument likewise fails. As Burnett concedes, "[a]t a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial." *United States v. Raddatz*, 447 U.S. 667, 679, 100 S.Ct. 2406, 65 L.Ed. 2d 424 (1980). Burnett argues that we should create an exception to that general rule where the arresting officer whose reasonable

[1] Alternatively, it is possible that a police officer's testimony about having smelled marijuana constitutes lay opinion pursuant to Fed. R. Ev. 701, rather than expert testimony pursuant to Fed. R. Ev. 702.

suspicion is at issue does not testify.[2] We need not resolve that novel issue because of the district court's wise decision to adopt the magistrate judge's recommendation subject to reconsideration after all relevant testimony was received at trial. Thus, when Keenan testified at trial, Burnett could have tested through cross-examination his credibility and ability to recognize the smell of marijuana. Accordingly, Burnett's claim that his right to confrontation was violated by the magistrate judge's acceptance of hearsay fails.

We AFFIRM.

[2] It is unclear that either the Government or the magistrate judge understood that Burnett was making an argument relevant to the traffic stop or subsequent investigation by Keenan. The motion to suppress mentions neither "reasonable suspicion" nor any cases relevant to this claim, but, instead, focused on the statements made to Moore. *See* R1-15. The magistrate judge noted that he did not read the motion to suppress to raise that claim but would still consider it. *See* R2-58. Thus, the Government's alleged failure to offer Keenan's testimony during the suppression hearing may have resulted from the fact that it was not alerted to the need to offer that testimony.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
Plaintiff-Appellee	)	
v.	)	CR. NO. 99-47-N
DARRELL KEITH BURNETT	)	
Defendant-Appellant.	)	

RECOMMENDATION OF THE MAGISTRATE JUDGE

On May 24, 1999, the court held an evidentiary hearing on the defendant's motion to suppress (doc. #15). After careful consideration of the evidence, the court concludes the motion to suppress should be denied.

THE FACTS

On February 10, 1999, the defendant was riding in a car with two other persons, one of whom was driving. A state trooper stopped the car because it had no license tag. When the driver was unable to produce a license, the trooper asked him to get out of the car and come with him to the trooper's vehicle. In that vehicle the trooper smelled the odor of marijuana. They denied knowledge of any drugs. The trooper told them to stay in the car because he had called for a canine unit. The defendant asked if he could get out of the car because it was hot. The trooper approved this request.

What happened next is the subject of disputed evidence. The defendant testified at the hearing that he went to a shaded area but after a short while moved to another shaded area. The

defendant testified that when he made this move, the trooper pulled his weapon on him, and he got scared and ran. The trooper ran after him and caught him. The defendant denied knowledge of any drugs. After careful consideration, the court does not credit this testimony of the defendant.

The court finds that after the defendant left the vehicle he began to run, and while the trooper chased him, the defendant threw away a small object which was later identified as a bag containing crack cocaine. After the trooper caught the defendant, he was handcuffed and returned to the location of the cars. At the scene officers read the defendant his *Miranda*[1] rights. By this time other officers had arrived on the scene, and the defendant was transported to a drug task force office. There he was interrogated by an agent of a federal drug task force. The agent determined that the defendant had received his rights warning. The defendant admitted that he had marijuana but initially denied any knowledge of the cocaine. After further questioning during which the officers told him he should tell the truth, the defendant stated that he knew he had the right to have a lawyer, but he wanted to say something "off the record". The agent told him he could make a statement. The defendant admitted the cocaine was his and said the other two persons with him had nothing to do with the cocaine.

DISCUSSION

1. The Vehicular Stop. The defendant claims that the state trooper exceeded the reason for the stop of the vehicle when he began without probable cause an investigation into

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

drugs. In *United States v. Pruitt*, ____ F.3d ____, 1999 WL 288129 (May 10, 1999), the court cited with approval as consistent with *Knowles v. Iowa*, ____ U.S. ____, 119 S.Ct. 484 (1998), the following quotation from the 10th Circuit:

> An officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation. *See United States v. Gonzalez-Lerma*, 14 F.3d 1479, 1483 (10th Cir.), *cert. denied*, 511 U.S. 1095, 114 S.Ct. 1862, 128 L.Ed. 2d 484 (1994). The investigative detention usually must "last no longer than is necessary to effectuate the purpose of the stop," and "[t]he scope of the detention must be carefully tailored to its underlying justification." Florida v. Royer, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325, 75 L.Ed. 2d 229 (1983).
>
> Lengthening the detention for further questioning beyond that related to the initial stop is permissible in two circumstances. First, the officer may detain the driver for questioning unrelated to the initial stop if he has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring. *See United States v. Soto*, 988 F.2d 1548, 1554 (10th Cir. 1993). Second, further questioning unrelated to the initial stop is permissible if the initial detention has become a consensual encounter. See *Gonzalez-Lerma*, 14 F.3d at 1483. The officer had not returned Mr.

Hunnicutt's license at the time he asked about guns and drugs, so further questioning unrelated to the initial stop must have been supported by an objectively reasonable suspicion of illegal activity. *See id.*; *United States v. McKneely*, 6 F.3d 1447, 1451 (10th Cir. 1993) (holding that encounter cannot become consensual while officer retains driver's documents).

A variety of factors may contribute to the formation of an objectively reasonable suspicion of illegal activity. Among those factors that have justified further questioning are having no proof of ownership of the vehicle, having no proof of authority to operate the vehicle, and inconsistent statements about destination. *See United States v. Jones*, 44 F.3d 860, 872 (10th Cir. 1995); *Gonzalez-Lerma*, 14 F.3d at 1483–84; *United States v. Pena*, 920 F.2d 1509, 1514 (10th Cir. 1990), *cert. denied*, 501 U.S. 1207, 111 S.Ct. 2802, 115 L.Ed. 2d 975 (1991). Also among those are driving with a suspended license, *see Jones*, 44 F.3d at 872, and reluctance to stop, *see id.; Villa-Chaparro*, 115 F.3d at 802; *United States v. Walraven*, 892 F.2d 972, 975 (10th Cir. 1989). In particular, the inability to offer proof of ownership or authorization to operate the vehicle has figured prominently in many of our cases upholding further questioning. *See United States v. Horn*, 970 F.2d 728, 732 (10th Cir. 1992); *United States v. Turner*, 928 F.2d 956, 959 (10th

> Cir.), *cert. denied*, 502 U.S. 881, 112 S.Ct. 230, 116 L.Ed. 2d 187 (1991); *United States v. Arango*, 912 F.2d 441, 447 (10th Cir. 1990), *cert. denied*, 499 U.S. 924, 111 S.Ct. 1318, 113 L.Ed. 2d 251 (1991); *see also United States v. Fernandez*, 18 F.3d 874, 879 (10th Cir. 1994) (The "defining characteristic of our traffic stop jurisprudence is the defendant's lack of ... some ... indicia of proof to lawfully operate and possess the vehicle in question, thus giving rise to objectively reasonable suspicion that the vehicle may be stolen.").

United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir. 1998).

In this circuit, once an officer has briefly stopped a motor vehicle operator for the purpose of issuing a traffic violation, the officer's continuing detention of the vehicle's occupants is authorized under the Fourth Amendment only if the officer can point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *United States v. Tapia*, 912 F.2d 1367, 1370 (11th Cir. 1990). The credible facts of this case fully meet the requirements of the law. The initial stop was for no license tag. When the driver was unable to produce a driver's license, the state trooper continued his investigation of the driver. When he smelled the odor of marijuana, the trooper had specific facts which supported the continued intrusion. When the defendant bolted, ran and threw away drugs, the state trooper than had probable cause to arrest the defendant. The motion to suppress

on the basis that the investigation exceeded its legitimate scope should be denied.

2. Miranda and the Confession. In his motion to suppress, the defendant claimed that at the defendant's detention hearing, the agent "testified falsely that Defendant waived his right to Counsel. Defendant is prepared to state under oath that he never talked to this Agent and certainly never confessed to this contraband." The credible evidence before the court shows that the defendant was given his *Miranda* rights, did acknowledge that he understood those rights, was interviewed by the federal drug task force agent, and did make a statement to the agent admitting that the drugs were his. There is absolutely no evidence of coercive police tactics. See Colorado v. Connelly, 479 U.S. 157 (1986). The defendant's motion to suppress on this basis should be denied.

Accordingly, it is the RECOMMENDATION of the Magistrate Judge that the defendant's motion to suppress be denied.

Done this 24th day of May, 1999.

CHARLES S. COODY
UNITED STATES MAGISTRATE JUDGE

ORDER

The Clerk of the Court is ORDERED to file the Recommendation of the Magistrate Judge and to serve by mail a copy thereof on the parties to this action. The parties are DIRECTED to file any objections to the said Recommendation within a period of 13 days from the date of mailing to them. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a de novo determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982). *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981, *en banc*), adopting as binding precedent all of the decisions of the former Fifth

Circuit handed down prior to the close of business on September 30, 1981.

Done this 24th day of May, 1999.

CHARLES S. COODY
UNITED STATES MAGISTRATE
JUDGE